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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

The full procedural history of this case is significant and is not fully reported in the petition heretofore filed in this court. The salient procedural facts are the following:

On August 8, 1969 plaintiffs filed their complaint seeking a declaratory judgment and requesting mandamus and injunctive relief. The subject matter of the controversy was certain unfilled judicial positions in the County of Passaic. The suit sought to compel the appointment of judges by declaring certain legislative practices of the New Jersey Senate unconstitutional. In brief the complaint concerned itself with or examination of the practice of "Senatorial courtesy" whereby in exercising its power of advice and consent the members of the New Jersey Senate would defer to the opposition of a Senator who disapproved of a judicial nominee slated to sit in that Senator's county.

All parties to the suit moved for summary judgment and on December 22, 1969 Hon. Worral Mountain, J.S.C. dismissed the complaint essentially for the reason that the subject matter of the suit did not present a justiciable controversy.

The plaintiffs thereafter filed a notice of appeal in the Superior Court - Appellate Division. While the matter lay pending unheard, the plaintiffs moved in the New Jersey Supreme Court for certification. The Supreme Court refused to certify the matter and the merits of the appeal were left for the Superior Court - Appellate Division. As is customary no reason was given by the Supreme Court for its refusal to certify the matter.

Thereafter certain factual developments rendered the subject matter of the litigation moot. A new Governor

was elected and a new legislative session commenced while the matter was pending in the Appellate Division. New judicial nominations were made and confirmed and Passaic County received its full complement of judges. A moratorium on the trial of civil cases was lifted in April of 1970 after having been in effect for about nine months. It had been this last factor which prompted institution of the suit.

Because of these new factors the defendants moved to dismiss the appeal as being moot. The motion was briefed by both sides but no oral argument was held as is the practice with motions in the Appellate Division. The Appellate Division granted the motion to dismiss the appeal without opinion. Plaintiffs then filed a notice of appeal in the Supreme Court of New Jersey asserting a constitutional question which would afford a hearing "as of right". The appeal, however, was from the dismissal by the Appellate Division because of the mootness of the controversy. The Supreme Court had once before decided not to certify the merits of the cause prior to it having become moot. For these reasons the defendants once more moved to dismiss the appeal – this time on the ground that the plaintiffs were not presenting a constitutional issue upon which they would have a right to appeal; rather they were appealing a non-constitutional issue, viz, the propriety of the Appellate Division's dismissal on grounds of mootness.

The New Jersey Supreme Court granted defendants' motion to dismiss the notice of appeal on October 7, 1970. This petition for a writ of certiorari filed in the United States Supreme Court followed on January 2, 1971.

ARGUMENT

The instant case is not an appropriate vehicle for presenting the important constitutional issues sought by the Petitioners for review.

The courts of the State of New Jersey have been on the vanguard of those courts which have fought judicially for legislative reform and responsiveness. Indeed the landmark case of *Baker v. Carr*, 369 U.S. 186 (1962) was anticipated by a prophetic State Supreme Court in *Asbury Park Press, Inc. v. Wooley*, 33 N.J. 1 (1960). Thus no abdication of judicial responsibilities can explain the reason for the disposition of the instant case. Rather the reason may be found in the disappearance of the controversy which prompted the suit. It will be remembered that after a determination at the trial level the Governor and Legislature acted in such fashion as to fill the judicial vacancies. After those events no relief could be given the plaintiffs other than an advisory opinion. In New Jersey as in the courts of the United States the role of the judiciary is to decide "cases" or "controversies". As applied to the relief presently being sought it is necessary that the issues presented take place in the context of a "case" since the appellate jurisdiction of this court is so limited by the United States Constitution, Article III, Section II. As a result of this constitutional limitation the courts have followed a self-imposed doctrine of "mootness". In *Powell v. McCormack*, 89 S. Ct. 1944 (1969) the court said,

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." 89 S. Ct. at p. 1951.

In *Powell* it was determined that the case had not become moot since the legislative body continued to withhold a salary of the congressman. But for that fact, it is clear there would have been no current issues justifying judicial intervention. However there are absolutely no remnants of the original case or controversy remaining to be resolved in the case at bar. All that remains is the belief of petitioners that at another time and in another place the legislative practice complained of may result in a delay in filling judicial posts. There is nothing in the record below to support this belief. Of even greater importance, there is nothing in the Constitution which can confer appellate jurisdication over fears of anticipated events when those fears are not embodied in a "case or controversy."

Where a petitioner seeks to raise issues of substantial constitutional importance this court has traditionally decided such issues only in cases that present them in an adequate manner. Circumstances which occur during the pendency of a case may remove the attractiveness of a case as a vehicle for presenting an issue otherwise appropriate for determination. As recently as two months ago this Court had occasion to dismiss a writ of certiorari as improvidently granted after the case had been briefed and argued. The language of *Piccirillo v. New York*, 91 S. Ct. 520 (1971) bears repeating.

> After considering the briefs and oral arguments of the parties on this writ, we have reached the the conclusion that the decision of the New York Court of Appeals in *Gold v. Menna*, 25 N.Y.2d 475, 307 N.Y.S.2d 33, 225 N.E.2d 235 (1969), which makes clear that transactional immunity is required in New York and also indicates that such court's earlier decision in the case before us, *People v. LaBello and Piccirillo*, 24 N.Y.2d 598, 301 N.Y.S.2d

544, 249 N.E.2d 412 (1969), may have rested on that premise, makes this case an inappropriate vehicle for deciding a question of such far-reaching importance.

> With the intervening decision in *Gold*, no controversy any longer exists between the parties as to the question which impelled us to grant the writ: whether, in the circumstances involved in this case, *Piccirillo* was entitled to "use" or "transactional" immunity. While it is true that, technically speaking, issues remain in the case concerning the kind of immunity required by federal law and, if it be "transactional" rather than "use" immunity in such a case as this, the proper scope of such immunity, both issues arise only against the sterile background of agreement between the parties that *Piccirillo* is entitled to "transactional" immunity under state law. Thus, our determination upon the fundamental constitutional question underlying this case would be in no sense necessary to its resolution in this instance. 89 S. Ct. at p. 521.

A case which seeks to disturb the relationship between the executive and the legislature and which further seeks to interfere with the internal workings of that legislature is obviously of a sensitive nature. Indeed, it is of such sensitivity that the trial court, in a careful analytical manner found that even *Baker v. Carr*, *supra* did not mandate interference into this particular political question. When the issues are of such importance it is not asking too much to expect them to be decided only in the context of a "live" controversy. But to reach the merits of this case would be to unnecessarily create tension between the State and Federal courts and between the executive, legislative and judicial branches. Surely such is not the hallmark of a healthy federalism.

There is an additional reason why this court should not entertain the issues presented in this case. The petitioners contend that certain practices of the legislature regarding adjournments operate to divest the Governor of his power to make interim appointments. The practice is claimed to be violative of Article V, Sec. 1, Par. 13 of the New Jersey Constitution. Clearly this issue is one that the federal courts ought to abstain from deciding until such time as a New Jersey court has interpreted its own Constitution.

Mr. Justice Frankfurter expressed this doctrine of abstention in *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101 (1944) when he said,

> If there is one doctine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality — here the distribution of the taxing power as between the State and the Nation — unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. *Railroad Commission v. Pullman Co., supra; Chicago v. Fieldcrest Dairies*, 316 U.S. 168; *In re Central R. Co. of New Jersey*, 138 F.2d 633. See also *Burford v. Sun Oil Co.*, 319 U.S. 315; *Meredith v. Winter Haven*, 320 U.S. 228, 235; *Green v. Phillips Petroleum Co.*, 119 F.2d 466; *Findley v. Odland*, 127 F.2d 948; *United States v. 150.29 Acres of Land*, 135 F.2d 878. Avoidance of such guess-work, by holding the litigation in the federal courts until definite deter-

minations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.

In the case at bar petitioners seek a federal interpretation that the New Jersey Legislature is in violation of the New Jersey Constitution by virtue of an internal rule of practice. Nothing would be more inappropriate than to have this issue decided for the first time by this court.

Along this same line the defendants in the trial court raised the issue of plaintiffs' failure to join an indispensable party. The issue was never decided since the trial court dismissed the suit for want of a justiciable controversy. However should this court reach the merits of this case that prior unheard defense would be in need of decision. It is by its nature one for decision by the state courts. The New Jersey Constitution, Article VI, Sec. 7, Par. 2 authorizes the Chief Justice to assign Superior Court judges to the various Divisions and Parts of the Superior Court and permits him to, "from time to time transfer judges from one assignment to another, as need appears." Similar flexibility is afforded by various legislative enactments (*N.J.S.* 2A:8-11, *N.J.S.* 2A:3-19.1 and *N.J.S.* 2A:3-20) as well as by Court Rule 1:33-3(b).

No showing was ever made that judicial manpower was unavailable to enable civil trials to take place in Passaic County during the nine month period of suspension. Indeed before a wholesale attack on the Legislature was undertaken petitioners might well have sought relief in a purely informal or administrative way by applying for judicial reinforcement through the office of the Chief Justice. Their failure to join the Chief Justice, who had the power to rectify the so-called crisis situation, was clearly the failure to join a party indispensable to a proper

resolution of the litigation. However this forum is hardly the place to litigate such an issue and the absence of a record on this issue could not result in an adequate presentation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari be denied.

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